United Nations AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 915

Case No. 1008: GUGGENHEIM

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, President; Mr. Mayer Gabay, Vice-President; Mr. Kevin Haugh;

Whereas at the request of Thomas Guggenheim, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, successively extended to 31 December 1997 and 31 March 1998 the time-limit for the filing of an application with the Tribunal;

Whereas, on 27 February 1998, the Applicant filed an application requesting the Tribunal, inter alia:

"(a) *To rescind* the decision of the Secretary-General endorsing the conclusion of the Joint Appeals Board not to make any recommendation in support of the Applicant's appeal;

(b) *To find and rule* that the Joint Appeals Board erred as a matter of law and equity in finding that the contested decision had not been implemented, that there was no evidence that the Applicant resigned under duress and for failing to provide appropriate and adequate compensation for the harm done to the Applicant for denial of due process and violation of his rights under the Staff Regulations and Rules;

(c) *To order* that the Applicant be reinstated with retroactive effect from 16 November 1994 and that he be paid full salary and benefits from that date to the present;

(d) *To award* the Applicant appropriate and adequate compensation to be determined by the Tribunal for the denial of due process suffered by the Applicant as well as for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(e) *To fix* pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case."

Whereas the Respondent filed his answer on 29 October 1998;

Whereas the Applicant filed written observations on 26 April 1999;

Whereas, on 5 July 1999, the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Operation in Somalia (UNOSOM) on 21 September 1993, on a six-month fixed-term appointment, as a Building Management Service (BMS) Assistant at the FS-3 level. On 21 March 1994, his appointment with UNOSOM was extended through 30 November 1994. On 15 November 1994, the Applicant separated from service upon resignation.

On 15 July 1994, the Applicant requested that he be transferred from UNOSOM to the United Nations Assistance Mission in Rwanda (UNAMIR).

On 31 July 1994, a BMS Assistant (hereinafter "the complainant") wrote to the Director of Administration, UNOSOM, stating that on 30 July 1994, the Applicant, accompanied by four other staff members, went to the complainant's residence, forced himself inside the complainant's room, attacked the complainant verbally, forced the

complainant down on his bed, "grabbed and pulled [his] hair, twisted [his] arms, and proceeded to beat [him]."

On 8 August 1994, the Applicant was selected to serve on mission with UNAMIR for an initial six-month period.

Also on 8 August 1994, the Director of Administration informed the Officer-in-Charge (OIC), Security Coordination, that, with respect to the complaint against the Applicant, "[p]rior to any action taken by my office, it is vital that a meticulous investigation of the matter be carried out as the matter is viewed extremely seriously if proven" and requesting that the OIC, Security Coordination, begin inquiries and submit conclusions without delay. The Senior Investigator, Investigations Unit, took statements from the Applicant, the complainant, and seven witnesses. The Applicant, in an undated statement, explained that on the night of 30 July, he and other staff members were on their way to the Applicant's cabin after being at the BMS Social Club, and that, on the way, he told the others that he "wanted to go say goodbye to [the complainant]." He stated that when the complainant opened the door of his cabin, the Applicant went inside and, using expletives, criticized the complainant's work habits. The Applicant further claimed, inter alia: "I did not strike [the complainant]. I only prevented him from leaving my presence by holding his hand so that I could talk to him." In a statement dated 18 August 1994, the complainant corrected certain facts from his prior statement, stating that the Applicant "did not succeed in pushing me down on the bed", that he "did not hold my hair" and that he "did not beat me". The complainant did, however, reaffirm that the Applicant "held and twisted [his] right hand ... [and] also held [his] neck."

On 19 August 1994, the Senior Investigator, Investigation Unit, reported his conclusions to the OIC, Security Coordination, including that the Applicant "did assault [the complainant]", but that the complainant's "credibility was somewhat tarnished because 18 days later he found it suitable to change facts about the incident."

On 21 August 1994, the Applicant wrote to the complainant, apologizing for the events of 30 July 1994, and asking the complainant to "reconsider filing a complaint against [the Applicant] or any other BMS staff member." On 23 August 1994, the complainant requested the Director of Administration to disregard his statement of complaint, as he had "received apologies from all those involved including [the Applicant]".

On 26 August 1994, the Director of Administration, UNOSOM, transmitted the investigation report to the Acting Director, Field Operations Division (FOD), and Chief, Personnel Section, FOD, recommending that the Applicant "be warned about his behaviour prior to his proceeding on another assignment." He noted that "while it was established that [the complainant] was assaulted, the extent of the assault remains questionable."

On 31 August 1994, the Chief, Personnel Section, FOD, sent a cable to the Director of Administration, UNOSOM, stating, "We have reviewed report on investigation into complaint against [the Applicant] and consider incident serious on basis of which we wish [to] advise we [are] no longer pursuing [the Applicant's] reassignment to UNAMIR and further that his appointment will not be extended upon expiry end November 1994 ... "

On 20 September 1994, the Applicant requested the Secretary-General to review the decisions not to reassign him to UNAMIR and not to extend his appointment beyond 30 November 1994.

On 14 October 1994, the Applicant wrote to the Deputy Security Coordinator, Investigation Unit, noting that he had not been requested to respond to the findings of the investigation. After contesting a number of assertions in the investigation report, he concluded:

> "I have petitioned the UN to hear my case and reconsider the findings and the decision made by FOD to terminate my appointment ... I have denied ... that [the complainant] was assaulted by me. I will attempt to dispute the findings of the investigation report and have the punishment for my actions re-evaluated".

On 31 October 1994, the Applicant tendered his resignation, effective 15 November 1994, stating that "Due to exigencies at my home in the United States, I must leave UNOSOM earlier than the expiration of my contract, 30 November 1994."

On 1 November 1994, the Applicant sent another memorandum of resignation in which he stated inter alia:

> "My motivation to work for this mission and its mandate has been irrevocably destroyed by the unfair and unjust actions taken by this administration and by FOD/NY subsequent to the complaint filed against me on 31 July 1994. The decisions made ... regarding the events of 30 July 1994 have been based on allegations that could not be substantiated; nor could they be proven. In my opinion, these decisions were made arbitrarily. I cannot, in good conscience, continue with UNOSOM without giving the mission my best effort."

On 17 February 1995, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 25 November 1996. Its considerations, conclusion and recommendation read as follows:

"Considerations

...

29. The Panel considered that by failing to inform the Appellant of the impending decision [not to extend his appointment] and to invite him to submit any written statement or explanation he might wish to make in this matter before a final decision was made about the extension of his appointment, the Administration had deprived him [of] the benefit of due process. Consequently, when final, the decision was vitiated by procedural error and would, under normal circumstances, have to be rescinded on the basis of Administrative Tribunal Judgement No. 252 (Noble).

30. The Panel, however, noted that the above-mentioned decision had not been implemented, as the Appellant had resigned before the expiry date of current appointment and that therefore it had not affected his rights. The Panel also considered the question of whether or not the Appellant's decision to resign had been made under duress, but it could not find any evidence to that effect in the material before it.

Conclusion and Recommendation

31. The Panel unanimously concludes

(a) That the contested decision had not been implemented, as it had been rendered moot by the Appellant's resignation;

(b) That the Appellant's decision to resign had not been made under duress.

32. The Panel unanimously decides to make no recommendation in support of the appeal."

On 20 January 1997, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him as follows:

"The Secretary-General has examined your case in the light of the Board's report. The Secretary-General has taken note of the Board's unanimous conclusions (a) that the contested decision had not been implemented, as it had been rendered moot by your resignation, and (b) that your decision to resign had not been made under duress. The Secretary-General has also taken note of the Board's unanimous determination to make no recommendation in support of your appeal and has decided to accept this recommendation and to take no further action in respect of your case."

On 27 February 1998, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legal expectancy that his contract would be renewed.

2. The Respondent's decision not to renew the Applicant's contract was improper because the serious charges against the Applicant were not referred to a disciplinary body and thus the Applicant was never given a meaningful opportunity to rebut the accusations against him.

3. The Applicant resigned due to the stress caused by the Respondent's actions against him and therefore such resignation did not render his claims moot.

Whereas the Respondent's principal contentions are:

1. The Applicant's claims are moot because the decision not to extend his fixed-term appointment was not implemented as a result of his resignation from service prior to the expiry of his appointment.

2. The Applicant has not produced evidence that his resignation was made under duress.

The Tribunal, having deliberated from 29 June to 23 July 1999, now pronounces the following judgement:

I. The Applicant appeals a decision of the Respondent dated 20 January 1997, accepting a unanimous JAB recommendation that the Respondent find that the decision contested by the Applicant had been "rendered moot by the Applicant's resignation" and that the Applicant's "decision to resign had not been made under duress". In his application, the Applicant argues that the decision of the Respondent not to renew the fixed-term appointment was unlawful and improper. He seeks retroactive reinstatement or, in the alternative, compensation in the amount of three years net base salary as well as damages and compensation due to a denial of due process.

II. The issue in this case is whether the decision not to renew the Applicant's fixed-term appointment violated his rights. The Applicant claims that this decision was improperly based on allegations that he assaulted another staff member, who subsequently withdrew his charges, and that he was not given any opportunity to rebut the allegations because no proper

disciplinary proceedings were ever instituted against him. He claims, therefore, that he was denied due process .

The Tribunal is of the view that the Respondent's failure to inform the Applicant of his right under staff rule 110.4 (a) to avail himself of the assistance of another staff member in his defence and to respond to the allegations deprived the Applicant of due process. (Cf. Judgement No. 576, Makwali (1992)). The Tribunal finds that claims by a staff member, especially involving denial of due process, are not necessarily extinguished by the subsequent resignation or change of status of the staff member (cf. Judgement No. 742, Manson (1995)).

III. As correctly stated by the JAB, the decision not to renew the Applicant's contract was never implemented because the Applicant resigned before the expiration date of his appointment. The Applicant argues that such resignation was made under duress. The Tribunal has long held that staff members have the burden of proving duress (cf. Judgements No. 719, Kartsev (1995); No. 811, Hallett (1997); and No. 910, Soares (1998)). The Tribunal is unable to find any evidence in the record that would substantiate the Applicant's claims of duress or coercion on the part of the Respondent that caused the Applicant to resign. Moreover, the Applicant's letter of resignation does not refer to coercion or duress. The Applicant only stated that "due to exigencies at [his] home in the United States" he would have to leave his post early.

IV. However, the Applicant's resignation prior to the expiry of his contract did not absolve the Organization from making decisions in accordance with proper procedures, which have been established to ensure fairness and impartiality. The Tribunal notes that the Applicant, during the time of his employment, requested an administrative review of this decision not to renew his contract and sought legal advice from a member of the Panel of Counsel, who informed him that his resignation would not affect his appeal.

V. In light of the Tribunal's findings that the Applicant was not afforded an opportunity to rebut the allegations made against him, the Tribunal holds that the Respondent failed to follow proper procedures. For this failure, the Applicant is entitled to compensation, which the Tribunal assesses at two months of his net base salary, at the rate in effect on the date of his separation from service.

VI. For the foregoing reasons, the Tribunal orders the Respondent:

(a) To pay the Applicant compensation in the amount of two months of his net base salary, at the rate in effect on the date of the Applicant's separation from service.

(b) Rejects the remainder of the Applicant's pleas.

(Signatures)

Hubert THIERRY
President

Mayer GABAY
Vice-President

Kevin HAUGH
Member

Geneva, 23 July 1999

Maritza STRUYVENBERG
Executive Secretary